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UNITED STATES SUPREME COURT

October Term, 1971

CLEVELAND McPHERSON PIPKIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, CLEVELAND McPHERSON PIPKIN, respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the Court of Appeal, Second Appellate District, Division Five, of the State of California, said Opinion being dated April 27, 1971.

OPINION BELOW

The Opinion of the Court of Appeal appears in Appendix "A" to this petition. It is reported in 17 Cal.App.3d 190 (1971) [..... P.2d .....]. Petition for Hearing was timely pre-

sented to the California Supreme Court, and the Petition for Hearing was denied (Appendix "B").

JURISDICTIONAL STATEMENT

The judgment and Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, was entered on April 27, 1971. A timely Petition for Hearing was denied by the Supreme Court of the State of California on June 23, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Do Amendments IV, V and XIV permit state officers to be employed to conduct searches and seizures pursuant to a federal arrest warrant issued after a grand jury indictment where no search warrant was either sought or obtained by the federal authorities?

2. Does *Giordenello v. United States*, 375 U.S. 480 (1958), permit a court (state or federal), on a motion to suppress, to examine the evidence in support of a federal grand jury indictment to ascertain whether there was "probable cause" for the issuance of the arrest warrant (i.e., if there was insufficient probable cause for the arrest, then the search would be unlawful)?

3. If every federal arrest warrant issued as a result of a grand jury indictment is conclusively presumed to be valid on its face and not subject to collateral attack for

insufficient "probable cause," then is not *every* search or seizure (except for weapons on the person) made incident to such an arrest, where no search warrant has been obtained, conclusively presumed to be illegal in violation of Amendments IV, V and XIV to the United States Constitution?

STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment IV–Searches And Seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V–Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property.

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . "

California Penal Code:

§ 1538.5. [Motion for return of property or suppression as evidence; Special hearings; New complaint or indictment; Appeals; Review by mandate or prohibition; Stay of Proceedings; Dismissal of action;

Release of defendant; Bail; Motions based on freedom of speech or press.]

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that:

"(1) The search or seizure without a warrant was unreasonable; or

"(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards."

STATEMENT OF THE CASE

On December 17, 1968, pursuant to a federal warrant, two Los Angeles County deputy sheriffs and three or four United States Customs Agents arrived at petitioner's apartment in Los Angeles. They announced their presence, were admitted, placed petitioner under arrest and searched the apartment. They did not have a search warrant, although the indictment had been returned 10 days before the arrest. After petitioner was arrested, he asked the officers if he could go to the bathroom. The deputy sheriffs accompanied him and found five capsules of cocaine and a dollar bill floating

atop a piece of paper in the toilet bowl.

Present in the apartment with petitioner was Patricia Davies, who was also placed under arrest for narcotics. While conversing with petitioner and Miss Davies, one of the Sheriff's deputies noticed that they had a white powder inside their nostrils. He did not attempt to take a sample of the powder, but "surmised" that it was in fact cocaine.

On June 13, 1969, petitioner moved the Superior Court of the State of California for the County of Los Angeles, pursuant to Penal Code § 1538.5, to suppress the evidence seized at the time of his arrest (AT[1] 3, *et seq.*)

It was stipulated that petitioner was arrested pursuant to a federal arrest warrant which was based upon a secret unrecorded grand jury proceeding at which "evidence of some sort was presented" (AT 3-4). Petitioner argued that the failure by the prosecution to show that there was probable cause for the issuance of the warrant made the arrest invalid and the evidence obtained incident thereto inadmissible; that "the unavailability of the grand jury transcript is in effect the same situation as the non-existence of a showing of any probable cause in the complaint" (AT 7-8).

The motion to suppress was denied (AT 13), the court stating that "we have to give credit and the [warrant] is proper" (AT 12). The judge indicated that the proper forum in which to attack the warrant is the federal court (AT 12) and that even if the indictment were quashed, the arrest would have been valid since the warrant was good on its face (AT 12-13).

On December 4, 1969, petitioner was found guilty

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1 As used herein, "AT" refers to the Augmented Reporter's Transcript on Appeal.

of violation of California Health and Safety Code § 11500. On January 9, 1970, probation was denied and petitioner was sentenced to imprisonment in the state prison for the term prescribed by law.

REASONS FOR GRANTING THE WRIT

The State's Failure To Show Probable Cause For Petitioner's Arrest Pursuant To The Federal Warrant Makes Any Evidence Seized Incident Thereto Inadmissible.

A. Introduction.

In *Giordenello v. United States*, 375 U.S. 480 (1958), this Court held that the warrant requirements of Rule 4, Federal Rules of Criminal Procedure, must be read in light of Amendment IV's admonition that "no warrants shall issue, but upon probable cause." See *People v. Sesslin*, 68 Cal.2d 418 (1968); *Aguilar v. Texas*, 378 U.S. 108 (1964). In *Ker v. California*, 374 U.S. 23, 34 (1963), this Court held that the states are permitted to develop "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the *states*, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and a concomitant command that evidence so seized is inadmissible against one who has standing to comply."

In contrast to the hardships attendant to successfully attacking a federal grand jury indictment[2], California practice

2. This Court has apparently precluded all examination of grand jury proceedings, under *United States v. Blue*, 384 U.S. 251 (1966).

is beneficent:

Penal Code § 939.6 provides that only evidence "admissible over objection at the trial of a criminal action" may be received by the grand jury, and case law is in accord. See *Mott v. Superior Court,* 226 Cal.App.2d 617 (1964).

The probable cause required must consist of legally competent evidence (*People v. Anderson,* 70 Cal.2d 15 [73 Cal.Rptr. 550] (1968)), which cannot have been obtained by illegal means (*People v. Scoma,* 71 Cal.2d 332 [78 Cal.Rptr. 491] (1969); *People v. Simon,* 45 Cal.2d 645 (1955)[3]).

In addition, California provides the defendant with a stenographic transcript of testimony before the grand jury (Penal Code § 938.1), while the federal proceedings are secret (Rule 6(e), Federal Rules of Criminal Procedure) and need not be transcribed (*e.g., Wyatt v. United States,* 388 F.2d 395 (10th Cir. 1968); Penal Code § 938, *contra*).

B. Validity of arrest and the exclusion of evidence seized incident to an invalid arrest.

It is clear that, even if all the evidence presented to the grand jury were legally competent under California law, the failure to supply petitioner with a transcript of the grand jury proceedings would violate his rights under Penal Code § 938.1. Considering the prevalence of the use of incompetent evidence–especially hearsay–before federal grand juries, the likelihood of a violation of Penal Code § 939.6 is also great.

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3. Although *Scoma* and *Simon* involved an Information rather than an Indictment, the standards are the same. *People v. Flanders,* 140 Cal.App.2d 765 (1956).

Petitioner submits, therefore, that it was error for the court below to "presume" propriety from a facially valid warrant and relegate any attacks to the federal court.

In *People v. Sesslin*, 68 Cal.2d 418 (1968), the Supreme Court of California set forth the requirements which must be met by a complaint to support a warrant. As the court said, quoting *Jolsen v. United States*, 381 U.S. 214 (1965):

> "Information in a complaint alleging the commission of a crime falls into two categories: (1) that information which, if true, would directly indicate commission of the crime charged, and (2) that which relates to the source of the directly incriminating information." (68 Cal.2d at 424.)

While the mere absence of a transcript undermines petitioner's rights under Penal Code § 995 and § 1538.5, it is submitted that, in light of the federal court's cavalier views concerning the admissibility of evidence before grand juries, it is impossible to assume that the hearsay testimony likely heard by the grand jury included "any facts relating to the identity or credibility of the source of the [witness'] information," a necessary ingredient according to *Sesslin* (68 Cal.2d at 425).

The instant case is thus very much like *Elkins v. United States*, 364 U.S. 206 (1960). There, the Court invalidated the "silver platter doctrine," under which evidence obtained by state officers in violation of federal law was being used in federal courts[4]. The Court said that the test for admissibility of evidence in federal courts is a federal one, a result analogous

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4. It is interesting to note that the Court in *Elkins* cited with seeming approval the refusal of state courts to allow the use, in state trials, of evidence seized by federal officers in violation of state law (364 U.S. at 220). See *Rea v. United States*, 350 U.S. 214 (1956), enjoining the use, by a state prosecutor, of evidence which had been illegally seized by federal agents.

to that which petitioner urges here–that the validity of an arrest warrant resulting in a California prosecution is determined by California law–and supported by the Court's holding in *Ker v. California, supra,* that it is the state law which determines the validity of an arrest.

Petitioner further submits that the search violated a fundamental Amendment IV principle, which had as much vitality at the time of his arrest as it does today; that is, that a warrantless search is unreasonable *per se* in the absence of exigent circumstances. *Coolidge v. New Hampshire*, 401 U.S. ..... (1971), 91 S.Ct. 2022. Here, the authorities were possessed of the indictment and arrest warrant ten days in advance of its execution. Clearly, there were no exigent circumstances to justify the warrantless search.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be granted and the judgment of conviction reversed.

Respectfully submitted,

BURTON MARKS of

MARKS, SHERMAN & SCHWARTZ
A Professional Corporation

Attorneys for Petitioner

APPENDIX "A"

OPINION

[Filed April 27, 1971]

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

THE PEOPLE, Plaintiff and Respondent, v. CLEVELAND McPHERSON PIPKIN, Defendant and Appellant.

2d Cr. No. 18021

S.C. No. A-239913

APPEAL from a judgment of the Superior Court of Los Angeles County, Alfred J. McCourtney, Judge. Affirmed.

Marks, Sherman & London, by Burton Marks, for Defendant and Appellant.

Evelle J. Younger, Attorney General, William E. James, Assistant Attorney General, and Maury W. Corn, Deputy Attorney General, for Plaintiff and Respondent.

By information in one count, defendant and a codefendant were charged with the crime of possession of cocaine, a violation of Health and Safety Code section 11500. Defendant pleaded not guilty. His motion under Penal Code section 1538.5 was denied. Defendant personally and all counsel waived trial by jury, and the court found defendant guilty as charged. Probation was denied, and defendant was sentenced to state prison for the term prescribed by law. Defendant appeals from the judgment.

Shortly prior to December 11, 1968, the federal grand jury at San Diego, California returned an indictment against

defendant. There is no transcript of the secret proceedings which led to the indictment. On December 11, 1968, a federal warrant for the arrest of defendant was issued in the District Court for the Second District of California, based on the indictment (Cr. No. 4680).

On December 17, 1968, at about 4:30 a.m., in possession of the federal arrest warrant, Deputy Sheriffs Figueroa and Solerno, together with federal Customs Agent Watson and two or three other agents from the Customs Service, arrived at Apartment No. 14 at 6003 Bryanhurst, Los Angeles, and Agent Watson knocked on the door. Approximately a minute later, defendant looked out the window adjacent to the door. Watson and Figueroa displayed their badges, pressing them against the window, and asked defendant to come to the door. Defendant opened the door, and was placed under arrest at that time. Defendant stated that he wished to go to the bathroom, and Deputies Figueroa and Solerno then accompanied him there. Deputy Figueroa noticed a dollar bill, a piece of brown paper with some loose powder on it, and three to five No. 3 white capsules containing a white, crystal-like powder, inside the toilet bowl, in the water. Deputy Solerno recovered these items from the toilet bowl.

Deputy Figueroa noticed that both defendant and co-defendant had white powder inside the nasal passages of their noses. He was an officer with approximately three years' experience in the field of narcotics, and knew that one method in which cocaine was commonly used in Los Angeles County was to inhale it through the nose.

After placing defendant under arrest, Deputy Figueroa advised him of his rights,[1] after which, in response to

1 Defendant was advised that he had a right to remain silent; that he did

questions, defendant stated he understood those rights; that he would give up his right to have an attorney present; and that the "stuff" recovered from the toilet bowl was cocaine.

In response to questions by the court, Deputy Figueroa also testified that while in the living room with defendant, before discovery of the contraband, he could not be certain whether anyone went between the bedroom and the bathroom, and that there was approximately a 30-seconds' delay between the time defendant appeared at the window and the time the door was opened.

An expert forensic chemist testified that he examined the items recovered from the toilet bowl and determined that the capsules contained cocaine, and that there were traces of cocaine on the dollar bill.

Defendant presented no evidence in his behalf.

Defendant contends that (1) the evidence was insufficient to support the conviction for unlawful possession of narcotics; and (2) the evidence was obtained as the result of an illegal search and seizure because the People failed to establish probable cause for the arrest warrant.

We do not agree with defendant's contention that the evidence is insufficient to support the conviction. The role of the appellate court is not to determine the credence or the ultimate weight to be given the evidence. We do not have to be convinced beyond a reasonable doubt. We must assume the existence of every fact which the trier of fact could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict. (*People v. Bard*, 70 Cal.2d 3, 4-5; *People v. Redrick*,

1 (cont'd) not have to tell the officer anything if he did not wish; that he had a right to have an attorney present during all stages of the proceedings; and that if he did not have the funds to obtain private counsel, counsel would be appointed for him free of charge.

55 Cal.2d 282, 284; *People v. Newland*, 15 Cal.2d 678, 681.) Here, the evidence of the white powder in the defendant's and codefendant's nostrils, the contraband floating in the toilet bowl, and the fact that defendant and codefendant were the only occupants of the apartment, plus the other evidence admitted at the trial, clearly support the trial court's conclusion.

Defendant's other contention, that the evidence should have been excluded because probable cause was not established for the issuance of the federal arrest warrant, is without merit. The warrant was issued by the United States District Court based upon a valid indictment returned by a federal grand jury. The burden of establishing invalidity of a search warrant is on the defendant. (*Williams v. Superior Court*, 230 Cal.App.2d 87, 97.) This burden was not met. The warrant was in full compliance with federal standards, and the arrest pursuant to the warrant was therefore valid. Since the indictment, the warrant, and the arrest were all valid, the discovery of the contraband was valid as incident to a lawful arrest. (*Chimel v. California*, 395 U.S. 752, 762-63.) The trial court properly denied defendant's motion to suppress the evidence.

The judgment is affirmed.

STEPHENS, Acting P.J.

We concur:

AISO, J.

REPPY, J.